

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

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|-----------------|---|---------------------|
| GREGORY PORTER, |) | |
| |) | |
| Petitioner, |) | |
| |) | |
| v. |) | No. 4:03 CV 651 DJS |
| |) | |
| DAVE DORMIRE, |) | |
| |) | |
| Respondent. |) | |

MEMORANDUM AND ORDER

_____This action is before the court upon the petition of Gregory Porter for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The petition was referred to the undersigned United States Magistrate Judge for review and a recommended disposition in accordance with 28 U.S.C. § 636(b).

On August 18, 2000, in the Circuit Court of St. Charles County, Missouri, petitioner pled guilty to and was convicted of first-degree burglary, first-degree robbery, armed criminal action, and two counts of forgery. (Doc. 8 at 39-40.) He was sentenced to concurrent terms of fifteen years imprisonment for the burglary, thirty years for the robbery, three years for the armed criminal action, and five years for each forgery charge.

Petitioner filed for post-conviction relief under Missouri Supreme Court Rule 24.035 on August 21, 2000. His request for an evidentiary hearing was denied, and the circuit court denied the post-conviction motion on July 23, 2001. (Id. at 41-42.) The Missouri Court of Appeals affirmed the denial of relief on May 9, 2002. (Resp. Ex. E.)

On May 29, 2003, Porter's petition for a writ of habeas corpus was filed in this court pursuant to § 2254. He alleges one ground for relief: that his plea counsel was ineffective for permitting him to plead guilty while he was allegedly under the influence of anti-psychotic medication. (Doc. 4 at 6.)

I. BACKGROUND

According to petitioner, he was prescribed thorazine, an anti-psychotic drug, while in jail. Petitioner alleges that he made his plea counsel aware of the medication and of the effects of the drug, which caused him to feel drowsy. Therefore, petitioner asked plea counsel to request a continuance for his plea hearing, but counsel failed to do so. (Id.)

The plea transcript indicates that the following colloquy occurred during the plea hearing:

Q. [by the court] Is there anything in connection with this case that you've asked of your attorney that he has not done?

A. [by petitioner] No.

Q. Are you fully satisfied with the services which your attorney has rendered to you?

A. Yes.

Q. Are you at the present time under the influence of any alcohol, narcotic or drug?

A. No.

Q. Are you sleepy or drowsy?

A. No.

Q. Are you having any difficulty understanding or participating in this proceeding?

A. No.

Q. And do you understand that you have the following rights, to maintain your plea of not guilty to this offense?

A. Correct.

* * *

Q. Have you been forced, threatened, or coerced by anyone to get you to plead guilty?

A. No.

* * *

Q. Are you pleading guilty here today freely and voluntarily?

A. Yes.

Q. Who made the final decision that you would enter a plea of guilty?

A. I did.

(Resp. Ex. B. at 8-9, 17-18.) Petitioner claims that he did not hear the judge ask him if he was under the influence of drugs but only heard the judge ask him if he was under the influence of alcohol. He argues that the thorazine rendered him incapable of understanding the proceedings and the rights he was surrendering by pleading guilty. He also argues that it affected his ability to give accurate answers to the judge's questions. (Doc. 4 at 6.)

II. DISCUSSION

A. Exhaustion of state remedies and procedural bar

For a state prisoner to obtain federal court relief under § 2254, he must have fully exhausted all remedies available in the state courts for each ground he intends to present in federal court. See 28 U.S.C. § 2254(b); Coleman v. Thompson, 501 U.S. 722, 731 (1991); Sloan v. Delo, 54 F.3d 1371, 1378 (8th Cir. 1995), cert. denied, 516 U.S. 1056 (1996).

Respondent concedes that petitioner has exhausted his available state remedies, because he afforded the state courts an opportunity to review the federal claims in his motion for post-conviction relief. (Doc. 8 at 2.)

B. Standard of review on the merits

This court's review of a state court decision is limited to situations when adjudication of the claim:

- (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
- (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d)(1)-(2). "A state court's decision is contrary to clearly established law 'if the controlling case law requires a different outcome either because of factual similarity to the state case or because general federal rules require a particular result in a particular case.'" Tokar v. Bowersox, 198 F.3d 1039, 1045 (8th Cir. 1999) (quoting Richardson v. Bowersox, 188 F.3d 973, 977-78 (8th Cir. 1999), cert. denied, 529 U.S. 1113 (2000)), cert. denied, 531 U.S. 886 (2000). The issue a federal habeas court faces when deciding whether a state court unreasonably applied federal law is "whether the state court's application of clearly established federal law was objectively reasonable." Williams v. Taylor, 529 U.S. 362, 409 (2000) (plurality opinion).

Respondent argues that petitioner's claim must fail because the Missouri Court of Appeals's decision was neither contrary to nor an unreasonable application of federal law as petitioner's claim is without merit. (Doc. 8 at 6-7.)

C. Merits of Ground 1

1. Evidentiary hearing

Petitioner alleges in Ground 1 that his Sixth Amendment rights were violated because he received ineffective assistance of plea counsel because his attorney failed to request a continuance for his plea hearing while he was allegedly under the influence of

anti-psychotic medication. (Doc. 4 at 6.) In his traverse, petitioner asserts that the record before the court is incorrect, but he fails to specify which portion of the record is flawed. (Doc. 10 at 1.)¹ He also states that this court must hold an evidentiary hearing on this ground because the Missouri state courts failed to conduct such a hearing. (Id. at 2.)

Under federal law, § 2254(e)(2) controls whether petitioner may receive an evidentiary hearing in federal district court on a claim whose factual basis was not developed in state court. There was no hearing in state court on the claim for which petitioner now seeks an evidentiary hearing. "Under the opening clause of § 2254(e)(2), a failure to develop the factual basis of a claim is not established unless there is lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel." Williams v. Taylor, 529 U.S. 420, 432 (2000).

The inquiry is whether the petitioner made a reasonable attempt to raise the claim in state court and not whether his efforts could have been successful. Id. at 435. Diligence requires that petitioner, "at a minimum, [sought] an evidentiary hearing in state court in the manner prescribed by state law." Id. at 437. The Missouri state courts had an opportunity to adjudicate petitioner's claim, which was diligently presented. The fact that he was unable to develop this claim in an evidentiary hearing in state court does not bar his request for such a hearing in federal court. Id. at 437.

Furthermore, "[a] federal court must grant an evidentiary hearing in a habeas corpus action brought under 28 U.S.C. § 2254 if relevant facts are in dispute and a fair evidentiary hearing was not granted in state court." Pruitt v. Housewright, 624 F.2d 851,

¹Specifically, he "denie[d] the records filed with this court simply because he ha[d] not had a chance to review them for accuracy." (Doc. 10 at 1.)

852 (8th Cir. 1980) (quoting Parton v. Wyrick, 614 F.2d 154, 158 (8th Cir. 1980)). In addition, petitioner's ground must establish a right to relief if proved. Id.

The motion court made the following findings of fact and conclusions of law:

Movant's sole claim is that counsel was ineffective in allowing Movant to plead guilty while allegedly under the influence of thorazine, a tranquilizer. Unfortunately for Movant, this claim is refuted by his own testimony during the guilty plea of August 18, 2000. On page 8, line[s] 22-24, Movant was specifically asked by this court if he was 'under the influence of any alcohol, narcotic, or drug.' Under oath, he answered in the negative.

Pursuant to Missouri Supreme Court Rule 24.035(b), the files and records of the case conclusively show that Movant is entitled to no relief.

(Resp. Ex. E. at 2-4.)

By answering negatively when asked if he was under the influence of a drug, petitioner's plea testimony refutes his claim that he was on thorazine. Standing alone, this allegation would not merit an evidentiary hearing. However, petitioner's further allegation that the thorazine affected his ability to understand fully the questions asked of him by the judge along with the allegation that his counsel knew of this impairment and should have requested a continuance is not refuted by the record made at the time the guilty plea was entered and accepted. If true, these allegations would taint the voluntary nature of the plea, and petitioner would be entitled to habeas relief. See Boykin v. Alabama, 395 U.S. 238, 242-43 (1969) (holding that, under the totality of the circumstances, the record must show that a plea of guilty is voluntary). Therefore, petitioner is entitled to an evidentiary hearing as to this ground for relief.

2. Ineffective assistance of counsel

To establish a violation of his right to effective assistance of counsel, petitioner must establish by a preponderance of the evidence that: (1) counsel failed to exercise the customary skill and diligence that a reasonably competent attorney would perform under similar circumstances, and (2) petitioner was prejudiced by his counsel's failure to perform competently. State v. Hall, 982 S.W.2d 675, 680 (Mo. 1998) (citing Strickland v. Washington, 466 U.S. 668, 687 (1984)). To prove prejudice, he must show a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. Id. To satisfy this second prong, petitioner must show that he "would not have pleaded guilty and would have insisted on going to trial" but for counsel's actions. Hill v. Lockhart, 474 U.S. 52, 58-59 (1985).

In determining whether counsel's assistance was inadequate, the inquiry must be whether, in light of all the circumstances, the identified acts or omissions were outside the broad range of competent assistance. Strickland, 466 U.S. at 690. Moreover, scrutiny of counsel's performance must be highly deferential, because there is a temptation to second-guess counsel's assistance after a conviction and because it is easy to conclude that a particular act or omission was unreasonable in hindsight. Id. That counsel rendered constitutionally adequate assistance is presumed. Id.; Kenley v. Bowersox, 275 F.3d 709, 712 (8th Cir.), cert. denied, 537 U.S. 919 (2002).

Once a guilty plea results, "a claim of ineffective [assistance of] counsel is relevant only to the extent that it affects the voluntariness and understanding with which the guilty plea was made." Estes v. State, 950 S.W.2d 539, 541 (Mo. Ct. App. 1997) (quoting Gilliehan v. State, 865 S.W.2d 752, 755 (Mo. Ct. App. 1993)). "The longstanding test for determining the validity of a guilty plea is 'whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to

the defendant.'" Hill, 474 U.S. 52, 56 (1985) (quoting North Carolina v. Alford, 400 U.S. 25, 31 (1970)). Challenges to guilty pleas based on ineffective assistance of counsel are tested under the two-part standard in Strickland. Id. at 58.

Generally, a voluntary guilty plea waives all non-jurisdictional defects. See United States v. Beck, 250 F.3d 1163, 1166 (8th Cir. 2001). "A defendant who repeatedly assures the court that he is satisfied with his counsel's performance and that his counsel had done everything that he requested, is later barred from obtaining post-conviction relief based on ineffective assistance of counsel." Estes, 950 S.W.2d at 542 (quoting Hamilton v. State, 865 S.W.2d 374, 375 (Mo. Ct. App. 1993)). "The mere ingestion of drugs is insufficient to render a person incapable of pleading guilty . . . where the person remains able to understand and to assent freely to his conviction." Tyler v. State, 787 S.W.2d 778, 778 (Mo. Ct. App. 1990).

The motion court found that:

A thorough review of the plea transcript demonstrates that [petitioner] responded with unequivocal, straightforward and lucid answers to the questions posted by the court. He indicated that he was not under the influence of any alcohol, drug, or narcotic and that he was not sleepy or drowsy. The trial court thoroughly questioned [petitioner] regarding the effect of his guilty plea and sentencing, and he indicated that he understood the ramifications. The trial court asked [petitioner] if he understood the charges filed against him as well as the penalties, and he responded in the affirmative. Finally, [petitioner] stated that he was freely and voluntarily entering into the guilty plea.

(Resp. Ex. E at 2-4.)

Petitioner alleges that he told his plea counsel that he was under the influence of thorazine which was making him drowsy and that he asked plea counsel to request a continuance. Furthermore, he states that he would have testified to this conversation had he been granted an evidentiary hearing. (Doc. 4 at 6.) The files and

records of this case do not conclusively show that petitioner is entitled to no relief. Further proceedings therefore are required in this case.

Petitioner should be allowed to complete discovery, and an evidentiary hearing should be held to determine whether petitioner can demonstrate that he was taking thorazine and that plea counsel's failure to request a continuance for his plea hearing rendered his guilty plea involuntary or unknowing. Upon a properly developed record, this court will apply the Strickland standard to determine whether petitioner is entitled to relief.

For the reasons mentioned above,

IT IS HEREBY ORDERED that the following counsel is appointed to represent petitioner under the Criminal Justice Act.

Kenneth W. Bean, Esq.
Sandberg and Phoenix
One City Centre, 15th Floor
St. Louis, MO 63101
314.231.3332

IT IS FURTHER ORDERED that the Clerk shall provide said appointed counsel with a copy of the public file of this action.

IT IS FURTHER ORDERED that a status and scheduling conference with all counsel and the court is set for Friday, November 5, 2004, at 10:00 a.m.


DAVID D. NOCE
UNITED STATES MAGISTRATE JUDGE

Signed this 10th day of September, 2004.